In the

Supreme Court of the United States.

October Term, 1940.

No. ~~1004~~. 63

THOMAS W. WHITE ET AL., FORMER COLLECTORS OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, *Petitioners*,

v.

WINCHESTER COUNTRY CLUB.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court for the District of Massachusetts (R. 59-77) is reported in 30 F. Supp. 142. The opinion of the Circuit Court of Appeals for the First Circuit (R. 117-121) is reported in 117 F. (2d) 146.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 30, 1941 (R. 121). The petition for a writ of certiorari was filed on April 29, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

In addition to annual dues and initiation fees the respondent collected from its members and paid over to the petitioners certain amounts for golf privileges of members and for golf and tennis privileges extended to persons in the families of such members. Were these amounts so collected for golf and tennis privileges subject to tax as "dues or membership fees," within the meaning of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928?

Statute Involved.

Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, is set forth in an appendix to this brief, *infra*, pp. 9-10.

Statement.

These were actions against two former Collectors of Internal Revenue and a former Acting Collector of Internal Revenue to recover taxes on amounts paid for certain golf and tennis privileges. The facts as stated in the "Findings of Fact," made by the District Court in its opinion (R. 61-72) and as they appear elsewhere in the record, may be summarized as follows:

In each of the cases it appeared that the respondent on November 16, 1935, on behalf of and as agent for its present or former members, or the personal representatives of any deceased member, pursuant to the provisions of Article 54 of Regulations 43, duly filed with the Commissioner of Internal Revenue a claim for refund in the amount of $9211.25. Said claim for refund was rejected on June 9, 1936, and these actions brought within two years from said

date in accordance with the provisions of Section 3226 of the Revised Statutes, as amended (R. 13-14).

The District Court, in its "Findings of Fact," said in part as follows (R. 69-70):

> "Members were permitted to engage privileges for either themselves or their families quite informally. The practice was merely to let the officers know in some way either in writing or orally what privileges were wanted. No action was ever taken by the Board of Directors approving or disapproving such action. Privileges were dropped in the same informal manner, and if privileges were taken or dropped in the middle of the year, suitable adjustments were made. Members were billed in March for dues and for privileges for the coming year. If no word had been received from a member as to the privileges desired, the same privileges as he had previously held were included on his bill, but he was quite at liberty to strike off such privileges as he did not want, and no attempt was made to collect for such privileges thus dropped. On the other hand, by Article X of the by-laws, 'A member not resigning before the beginning of the Club year shall be liable for the dues for that year.' The Club year began January first.
>
> "Upon the agreed facts and all the other evidence, I find that the plaintiff had but one class of membership with the exception of a small class of special members, that neither possessors of golf privileges nor the holders of tennis privileges constituted a separate class of membership, that golf privileges and tennis privileges were optional with members and under the by-laws and the Club practice or policy could be acquired informally at any time, that once acquired there was no recurring obligation to take or pay for them in a succeeding year, that no formal action was required

> for surrendering such privileges during that year and that the fees therefor were not fixed or definite charges of any particular class of membership."

On October 27, 1939, judgments were entered for the respondent in the three cases for an aggregate amount of $9211.25 and interest (R. 31, 45, 58).

The Circuit Court of Appeals, in affirming the judgments of the District Court, said in part as follows (R. 120-121):

> "We find nothing in the instant case or in the decisions above referred to [1] that requires us to disturb the findings of the District Judge that there was but one class of membership in the plaintiff Club,—with the exception of a small special class not involved. The temporary nature of the privileges purchased by members, the fact that such privileges, different in kind, were optional, could be taken and dropped informally at pleasure and involved no recurring obligation to make further payments, are not attributes of a class of membership; but, on the other hand, indicate a limited, temporary use of particular facilities of the club, payment for which cannot be called 'dues or membership fees' in the ordinary acceptation of those terms."

Argument.

Giving the words of the statute their ordinary meaning, which this Court has many times said should be done,[2] the

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[1] *Weld* v. *Nichols*, 9 F. (2d) 977; *Foran* v. *McLaughlin* (C.C.A. 9), 59 F. (2d) 158, certiorari denied, 287 U.S. 637; *Baltimore Country Club* v. *United States*, 7 F. Supp. 607; *Williamson* v. *United States*, 12 F. Supp. 26; *Philadelphia Cricket Club* v. *United States*, 30 F. Supp. 141; *Hardt* v. *McLaughlin*, 25 F. Supp. 684.

[2] *Old Colony R.R. Co.* v. *Commissioner*, 284 U.S. 552, 560, and cases cited; *Helvering* v. *William Flaccus Oak Leather Co.*, April 28, 1941.

words "dues or membership fees" must refer to amounts paid by persons for the privilege of becoming members of a club, or, after becoming members, to continue their membership. In the instant case the initiation fee was $100, and the annual dues $50 (R. 65-66). Continued membership involved the payment of $50 annual dues and no more. No other amounts were payable by members as an incident to their membership.

In *Weld* v. *Nichols* (D.C. Mass.), 9 F. (2d) 977, which was a suit by a member of The Country Club in Brookline, it was held that, where the plaintiff paid his annual assessment of $125, and "elected to avail himself of the privilege of playing golf, and paid the additional fee of $7.50 for that privilege for six months," the fee was not subject to tax under Section 501 of the Revenue Act of 1924, imposing a tax on "dues or membership fees" exceeding $10. Judge Morton, in his opinion, stated that the words "dues or membership fees" were "*meant to cover only fixed and definite charges applicable to all members of each particular class of membership.*" (Italics ours.)

The doctrine of the *Weld* case was followed in *Baltimore Country Club* (D.C. Md.), 7 F. Supp. 607; *Williamson* v. *United States* (D.C. W.D. No. Car.), 12 F. Supp. 26; and in *Philadelphia Cricket Club* v. *United States*, 30 F. Supp. 141. The doctrine was impliedly recognized in *Foran* v. *McLaughlin* (C.C.A. 9), 59 F. (2d) 158, certiorari denied, 287 U.S. 637, although the payments there were held to be dues on the ground that they represented a fixed contractual liability, applicable to all members of a certain class of membership.

The petitioner's reasons why the writ should be granted are (*a*) that this case is in conflict with the Third Circuit in *Merion Cricket Club* v. *United States*, March 28, 1941, not yet officially reported (41 C.C.H. par. 9351), (*b*) that a decision of this Court is desirable in view of the difficulty of

administering the Act on account of the diversity of result and theory in the cases.

As to (a) it is submitted that there is no conflict in the Circuits. In all the cases which have been decided by the District Courts and the Circuit Courts of Appeals on the issue here, Judge Clark is the only judge who has ever intimated that the doctrine of *Weld* v. *Nichols*, *supra*, is not the law. That doctrine was accepted by his associates, and it has been uniformly followed in all the other cases. Without comment on the correctness of the result in the *Merion* case, the decision in that case is not in conflict with any other Circuit and a majority of the Court in that case approved and adopted the principle enunciated by Judge Morton in *Weld* v. *Nichols*, *supra*.

In the *Merion* case the yearly golf charges were fixed and recurring and, unless the member notified the Club before the end of the club year that he did not want golf privileges for the following year, were automatically renewed, and he was liable for them for another year, the same as in the case of annual dues. He could not give them up after six months unless there was a waiting list for golf privileges and the Club relieved him and accepted someone else in his place.[3] In the instant case golf and other privileges were optional, were acquired informally, and having once been acquired there was no recurring obligation to take or pay for them in a succeeding year. Such privileges could be surrendered at any time and suitable adjustments made.

Nor do we believe that the petition should be granted in order to obtain a decision of this Court as to the meaning of "dues or membership fees." In both the *Merion* case and in *Foran* v. *McLaughlin*, *supra*, the obligation as to the payment was a fixed liability incident to a well defined group. It was a contract where both sides were bound for a period irrespective of the amount of user of the facility.

[3] *Hardt* v. *McLaughlin*, 25 F. Supp. 684.

In the instant case there was no fixed liability, no mutuality of obligation. There was no well-defined group, each person in which had to pay whether or no. The right to use the facility could be and was obtained at the sole pleasure and option of the person and paid for accordingly. It could be abandoned on the same basis. Such an arrangement is not a contract and created no fixed liability. Judge Clark seems to feel that "recurring certainty" has been the oasis on which the Courts have determined the question of taxability of payments for the use of facilities. He has not analyzed with discriminating care the opinions and decisions of the other Courts. All the decided cases turn on the question of a *contractual* liability. The recurrency feature is strong and important evidence of obligation as opposed to the free exercise of option. His associates clearly see this. He does not.

As was stated by Judge Peters in the Court below (R. 119):

> "The question whether charges made by country clubs to their members for golf and similar privileges are to be classified as taxable 'dues or membership fees' or nontaxable items of incidental expense, can seldom be determined by formulating a general *self-applying* definition of the statutory words. In many cases the line of demarcation is indistinct, and the decision turns upon the particular facts disclosed." (Italics ours.)

A sound principle in the interpretation of this statute has been in effect a long time, again and again reiterated and approved by the Courts. That close or borderline cases may have arisen or may arise making the application of that principle difficult to the facts of a few particular cases is nothing new in the law. It certainly calls for no further

examination of the instant case, where all the judges hearing the case in two Courts have been unanimous both as to the law and the facts involved.

Conclusion.

The decision below is correct. There is no conflict in the Circuits. The case depends in large measure upon its facts. The petition should be denied.

Respectfully submitted,

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APPENDIX.

Section 413 of the Revenue Act of 1928—CLUB DUES TAX —(26 U.S.C.A. sec. 950):

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(a) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment, irrespective of the purpose for which made; and the term 'initiation fees,' includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or

loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed or loaned."

(b) Subsection (a) of this section shall take effect on the expiration of thirty days after the enactment of this Act.